Hj Muhammad Khudzairi bin Hj Marfuji v Public Prosecutor

COURT OF APPEAL (BRUNEI DARUSSALAM) — CRIMINAL APPEAL NO 11 OF 2008
POWER PCA, MORTIMER AND DAVIES JJCA
16 MAY 2009

Criminal Law — Misuse of Drugs Act (Brunei) — ss 3A & 29 read with Second Schedule — Possession for purpose of trafficking — Appeal against conviction — Unsatisfactory nature of drug analysis — High Court's improper rejection of defence witnesses' evidence — Whether appeal against conviction ought to be allowed

The appellant was convicted in the High Court of possession for the purpose of trafficking in methylamphetamine — an offence pursuant to s 3A of the Misuse of Drugs Act (Brunei) punishable under s 29 read with the Second Schedule of the same Act — and sentenced to death. He appealed to the Court of Appeal against the conviction. Counsel pursued the appeal on numerous grounds. Three of those grounds concerned: (a) certain comments made by the trial court on counsel's suggestion that the narcotic officers had conspired to frame up the appellant; (b) the method of assessment and/or analysis of the drugs by the scientific officers; and (c) the failure of the High Court to give reasons for rejecting the testimony of several defence witnesses.

Held, allowing the appeal:

(1) There was no merit on counsel's complaint on the trial court's comments that his suggestion was 'astonishing'. Firstly, the comments did not constitute a direction to a jury. Secondly, it was indeed astonishing that counsel would make such a suggestion after the completion of the defence evidence, given that there had been no cross-examination of the officers suggesting that there had been a conspiracy by them to frame the appellant (see para 11). *Lee Fuk Hing v HKSAR No 7 of 2004* distinguished.

(2) The court was gravely concerned with: (a) the unsatisfactory nature of the evidence of the scientific officer and the expert as to the reliability of the old test when considered alongside the test currently applied; (b) the failure to follow the textbook approach when applying the 'Outliers Test', and (c) the failure to use the mandatory quantity stipulated in the UNODC manual in the analytic tests. The court was left in doubt as to reliability of the expert evidence. The appeal had to be upheld on this ground (see paras 48–49).

(3) The High Court's reasons for rejecting the evidence of the defence witnesses upon the basis that they had tailored their evidence were inadequate and that inadequacy prevented the Court of Appeal from reviewing the correctness of the trial decision. It was of no moment that the inadequacy was occasioned by the failure of the prosecution to pursue the matter in cross-examination (see para 67).

[Bahasa Malaysia summary

Perayu telah disabitkan oleh Mahkamah Tinggi bagi milikan methylamphetamine untuk tujuan pengedaran — satu kesalahan di bawah s 3A Akta Penyalahgunaan Dadah (Brunei) boleh dihukum di bawah s 29 dibaca dengan Jadual Kedua Akta tersebut — dan dihukum mati. Dia merayu kepada Mahkamah Rayuan terhadap sabitan. Peguam meneruskan rayuan tersebut atas beberapa alasan. Tiga daripada alasan-alasan adalah berkenaan: (a) komen-komen tertentu yang dibuat oleh mahkamah perbicaraan terhadap cadangan peguam bahawa pegawai-pegawai narkotik telah berkonspirasi untuk menganiayai perayu; (b) kaedah taksiran dan/atau analisis dadah tersebut oleh pegawai-pegawai saintifik; dan (c) kegagalan Mahkamah Tinggi memberi sebab-sebab untuk menolak testimoni beberapa saksi-saksi pembelaan.

Diputuskan, membenarkan rayuan:

(1) Tidak ada merit dalam aduan peguam terhadap komen-komen mahkamah perbicaraan bahawa cadangannya adalah 'mengagumkan'. Pertama sekali, komen-komen tersebut tidak menjadi satu arahan kepada juri. Kedua, ia sememangnya mengagumkan yang peguam membuat cadangan sedemikian selepas penyudahan keterangan pembelaan, memandangkan tidak ada pemeriksaan balas terhadap pegawai-pegawai yang mencadangkan satu konspirasi oleh mereka untuk menganiayai perayu (lihat perenggan 11). *Lee Fuk Hing v HKSAR No 7 of 2004* dibezakan.

(2) Mahkamah dengan serius risau dengan: (a) keterangan yang tidak memuaskan oleh pegawai saintifik dan pakar berkenaan kebolehpercayaan ujian cara lama apabila mempertimbangkannya dengan ujian yang digunakan kini; (b) kegagalan untuk mengikut pendekatan buku teks apabila menggunakan 'Outliers Test', dan (c) kegagalan untuk penggunaan kuantiti mandatori yang ditetapkan dalam Manual UNODC dalam ujian-ujian analitis. Mahkamah meragui kebolehpercayaan keterangan pakar tersebut. Rayuan harus dibenarkan atas alasan ini (lihat perenggan 48–49).

(3) Alasan-alasan yang diberikan oleh Mahkamah Tinggi untuk menolak keterangan saksi-saksi pembelaan atas dasar bahawa keterangan mereka merupakan satu rekaan adalah tidak memadai dan kekurangan itu

mencegah Mahkamah Rayuan dari menyemak ketepatan keputusan perbicaraan. Kekurangan ini bukan pada bila-bila masa disebabkan oleh kegagalan pendakwaan meneruskan perkara ini semasa pemeriksaan balas (lihat perenggan 67).]

Notes

For a case on Misuse of Drugs Act (Brunei) in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 787.

Cases referred to

Balasingham v PP [1959] MLJ 193, HC (refd)
HKSAR v Tang Siu Chuen Criminal Appeal No 67 of 2007, CA (refd)
Lee Fuk Hing v HKSAR No 7 of 2004 (distd)
PP v Ang Soon Huat [1991] 1 MLJ 1, HC (folld)
R v Braick [2002] 1 SCR 903, SC (refd)
R v REM [2008] SCC 51, SC (refd)
R v Sheppard [2002] 1 SCR 869, SC (refd)

Roy Prabhakaran (Cheok Sankaran Halim) for the appellant.
Christopher Ng (Pg Nina Jasmine bt PLKDR Pg Bahrin with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Power PCA:

[1] The appellant was charged:

> That you did, at around 2235 hours on the 10th day of December 2005, on a boat at the jetty, Kampong Bandung, Jalan Istana Darul Hana, Bandar Seri Begawan in Brunei Darussalam, not being a person authorized by the Misuse of Drugs Act, Cap 27 or the Regulations made thereunder, did have in your possession a total of 146.28 grammes of clear crystalline substances containing a total of 109.27 grammes of a Class A controlled drug, to wit METHYLAMPHETAMINE, for the purpose of trafficking in contravention of section 3A of the Misuse of Drugs Act and you have thereby committed an offence punishable under section 29 read with the Second Schedule of the said Act.

[2] On 25 October 2008, he was convicted after trial before Justice Chong and Justice Hairol ('the court') and sentenced to death. He is now represented by Mr Roy Prabhakaran, as he was at trial, in an appeal against that conviction.

[3] The evidence, as set out by the court, is as follows:

> 2. The charge against the defendant arose out of events on 10 December 2005 at about 10pm when officers of the Narcotics Control Bureau (NCB) went

to the jetty at Kampong Bandung (also known as the Tumasek jetty) where they mounted a surveillance operation.

3. There was evidence from Assistant Narcotics Control Officer Hj Hairman bin Hj Abd Rahman (ANO Hairman) that earlier in the evening at about 7.30pm he had received information over the phone from an informer concerning drug trafficking activity and that someone known as 'Hj Giri' would be arriving at the jetty that night using a red boat with the mark '777' on the cover of the fuel tank and the front area.

4. ANO Hairman said he did not know who the caller was at first but in the course of his conversation was able to ascertain that the person was someone from his village. The informer was not Hj Latif bin Hassan (Hj Latif). He knew who Hj Latif was as he had raided his house previously.

5. It was also the evidence of ANO Hairman that he immediately informed Senior Narcotics Officer Hj Sabtu bin Sidup (SNO Sabtu) about the information he had received.

6. SNO Sabtu gave a briefing concerning the surveillance operation at Tumasek jetty to narcotics officers of the Enforcement Unit and Marine Unit at 9.40pm. The three narcotics officers instructed by SNO Sabtu to arrest the suspect were Assistant Narcotics Officer ZulMajdi bin Yussop (ANO ZulMajdi), Assistant Narcotics Officer Ahmad Sukarni bin Umar (ANO Sukarni) and Assistant Narcotics Officer Jamarul bin Dahlan (ANO Jamarul). Shortly after these three officers arrived at Kampong Bandung the defendant's boat was seen approaching the jetty. ANO ZulMajdi said he was waiting at the carpark while ANO Sukarni and ANO Jamarul were at the jetty pretending to fish using fishing rods at the time.

7. According to the statements of these three officers made under s 117B of the Criminal Procedure Code, ANO ZulMajdi boarded the defendant's boat as soon as it arrived at the jetty followed by ANO Sukarni and ANO Jamarul. However, in oral evidence in court, it emerged that what happened was that after the defendant's boat arrived at the jetty, ANO ZulMajdi boarded alone and after confirming it was the targeted boat by the presence of the mark '777', he got off the boat under the pretext that he had to collect his wallet, walked to the car park, then quickly returned to the jetty and signalled to ANO Sukarni and ANO Jamarul to follow him onto the boat.

8. As soon as the trio were on the boat, ANO ZulMajdi grabbed the defendant's left hand and identified himself as a narcotics officer. A struggle ensued as the defendant resisted arrest. But ANO ZulMajdi was able to handcuff the defendant with the assistance of ANO Sukarni and ANO Jamarul.

9. All three officers gave evidence that during the struggle they saw the defendant using his right hand to take a black plastic bag from a pouch which he was wearing around his waist at the time and throwing it into the river. In cross-examination they disagreed the defendant had picked up the black plastic bag from the floor of the boat.

10. Also in cross-examination, ANO Jamarul explained that he did not actually see the defendant taking the black plastic bag out of his waist pouch during the struggle as he went to the stern of the boat to try to turn the engine off; the defendant had been 'pulled' towards the bow of the boat by ANO ZulMajdi; he saw the defendant, who had his back to him, reach for his waist with his right hand to take something; he then saw an object being thrown into the river by the defendant; and later, he saw the waist pouch on the floor of the boat.

11. In the course of the struggle with the defendant Narcotics Officer Kamran bin Hj Jafaruddin (NO Kamran) and Assistant Narcotics Officer Azman bin Asar (ANO Azman) also boarded the boat. ANO Azman managed to turn off the boat engine after ANO Jamarul failed to do so. There was evidence from ANO Azman that he, too, saw the defendant throw a black plastic bag into the river although he did not see where the defendant had got it from.

12. Assistant Narcotics Officer Rahman bin Hj Kamis (ANO Rahman) then got on the boat in order to take photographs. NO Kamran told ANO Azman to steer the boat to the location where the black plastic bag thrown by the defendant was floating in the river near the jetty. ANO Rahman said he took 12 exposures of the black plastic bag floating in the river and the scene but then realised the camera film had not 'rolled' so he threw it away and used a new roll.

13. The black plastic bag was retrieved from the river by ANO ZulMajdi. There was evidence from ANO Sukarni that he asked the defendant for his name at this point in time and he answered: 'Hj Md Khudzairi'. But the diary entries (at 37 and 38) of ANO Jamarul show that this exchange between ANO Sukarni and the defendant took place after ANO Azman had steered the boat back to the jetty.

14. It was the evidence of NO Kamran, corroborated by ANO Sukarni, that after the retrieval of the black plastic bag and when the boat had been taken to the side of the jetty, he first asked the defendant what was inside the black plastic bag. The defendant answered: 'Batu' ('Rocks'). He then asked the defendant what he meant by 'Batu'. The defendant answered: 'Syabu'. ANO Jamarul recorded the first question and answer in his pocket diary at entry 38. But there is no record of the second question and answer.

15. There was evidence from NO Kamran, ANO Sukarni, ANO Jamarul and Narcotics Officer Jali bin Abdul (NO Jali) that 'Batu' is another name for syabu. NO Jali also said: 'Batu is normally used by drug users and drug traffickers'.

16. The black plastic bag was opened by NO Kamran. Inside it he found three clear plastic packets of the same size containing crystalline substances. Photographs of these exhibits were taken by ANO Rahman. According to NO Kamran he then handed the exhibits to Assistant Narcotics Officer Mohd Abasni bin Samat (ANO Abasni), who was the exhibits officer, for safekeeping. This was confirmed by ANO Abasni who said he received the exhibits from NO Kamran. But ANO ZulMajdi gave evidence that he was the officer who handed the exhibits to ANO Abasni.

17. NO Kamran then searched the defendant and found a total of B$273 in the front right pocket of his trousers. Some coins were found in the waist pouch. The waist pouch and money were also handed to ANO Abasni.

18. ANO Jamarul gave evidence that at the jetty he read the pocket diary entries which he had recorded to the defendant. He asked the defendant to sign the diary if he agreed with the contents. The defendant signed on each page but not on entry 34. For ease of reference we set out entries 33 and 34 which read:

(33) ... who was suspected of being a drug trafficker and ANO ZulMajdi grabbed the left hand of the said boat driver and I saw the said man throw a black plastic of which the contents was believed to contain drugs with his right hand...

(34) And this was witnessed by ANO ZulMajdi after the said man grabbed his waist pouch. ANO Ahmad also saw him throw that black plastic away. When the man was being handcuffed ANO Zul Majdi did introduce...

19. ANO Abasni recounted that upon receiving the black plastic bag containing the three packets of crystalline substances from NO Kamran, he listed the items in an exhibit label which the defendant signed. These items and the label were then placed in a zip lock bag. Similarly, the money seized from the defendant's trouser pocket and the waist pouch containing the coins which he received from NO Kamran were also listed in exhibit labels. He took all these exhibits back to the NCB.

20. In the investigation room of the NCB, ANO Abasni said he prepared a seizure list in which he set out all the exhibits: black plastic bag containing three packets of crystalline substances (E1); cash of $273 (E2); waist pouch containing the coins (E3); and the defendant's boat (E4). The defendant signed this document. ANO Abasni said he also listed the exhibits in a handing over and receipt acknowledgement form (handing over form) which was signed by him and Assistant Narcotics Officer Pg Othman bin Pg Hj Ali (ANO Pg Othman) to whom he handed over all the exhibits mentioned.

21. ANO Pg Othman gave evidence that upon receiving exhs El, E2 and E3 from ANO Abasni on 11 December 2005 at about 0145 hours he examined the items in front of the defendant and then signed the handing over form. At 0205 hours he handed over exhs El, E2 and E3 to Assistant Narcotics Officer Hartina bt Agash to be kept in the temporary exhibit storage room (exhibit room). Before exh El was kept ANO Pg Othman said he weighed the black plastic bag and the three unopened packets of crystalline substances using a digital scale. The 'gross weight' amounted to 150.50g.

22. According to the s 117B statement of ANO Pg Othman, at that time he also instructed ANO Hairman to obtain the defendant's urine specimen and this was kept in a box. He handed the box to ANO Hartina to be kept in the exhibit room.

23. There was evidence from ANO Hartina that after receiving the exhs El, E2

and E3 together with the handing over form from ANO Pg Othman, she ensured that 'all the exhibits as listed were accounted for' before putting them in a 'special cabinet' in the exhibit room. She and Assistant Narcotics Officer Maswemah (ANO Maswemah) were the only ones with the key to the exhibit room.

24. It was also the evidence of ANO Hartina that she and ANO Pg Othman signed the exhibit handover book to show the handing over of the exhibits had taken place. No description of the exhibits was recorded in the exhibit handover book at the time the exhibits were handed over. But the handing over form prepared by ANO Abasni earlier which listed out exhs El, E2, E3 and E4 was attached to the exhibit handover book. Subsequently, on 15 December 2005 ANO Maswemah recorded the details of the exhibits in the 'EXHIBITS' column of the exhibit handover book

25. On 12 December 2005 at about 1035 hours ANO Hartina said she took exh E1 out of the exhibit room and handed it to ANO Pg Othman for fingerprint testing. ANO Hartina said that was the only time exh El was taken out of the exhibit room and this is reflected in the stamp endorsed in the exhibit handover book

26. ANO Pg Othman said he took the exh E1 firstly to the Legal Department and then to Gadong Police Headquarters for fingerprint testing. He was accompanied by two other narcotics officers. The quality of the fingerprints lifted from exh E1 was such that they could not be used for comparison.

27. After completion of the fingerprint test at about 1235 hours ANO Pg Othman said he brought exh E1 back to the NCB in order to collect the box containing the defendant's urine specimen. From the NCB Pg Othman went to narcotics laboratory carrying exhibit E1 and the urine box.

28. Arriving at the narcotics laboratory at about 1435 hours, ANO Pg Othman handed over exh El and the urine box to a Scientific Officer, Ak Md Helmy bin Pg Hj Rabaha (Ak Helmy), for analysis.

The defendant's statement

29. The defendant made two written statements to the NCB after his arrest. It was not in dispute that both statements were given voluntarily by the defendant. The first was an ordinary statement in question and answer form recorded on 11 December 2005 at 0215 hours by Assistant Narcotics Officer Mohammad Noor Ariffin bin Hj Kahar (ANO Ariffin). In this statement the defendant said he had taken Hj Latif to the Tumasek jetty using his son's boat; at the jetty Hj Latif told him to wait for a while and went off leaving behind the black plastic bag containing the three packets of crystalline substances; he managed to see what was inside the plastic bag and later put it under his seat; a man came on board and then left telling him to wait as he had to get his wallet from his car; the same man came back with two others; before he could reverse his boat the man pulled his hand but he managed to throw the plastic bag into the river; he threw the plastic

bag because it was not his and was 'scared to be involved in possession' of it; and he had known Hj Latif for 17 years and knew of his involvement in selling drugs. A

30. According to ANO Ariffin everything the defendant said was recorded in the statement. The defendant did not say that he had taken Murni to the jetty before his arrest or that Hj Mansor was there waiting for his daughter. B

31. Turning to the second statement, this was made on 12 December 2005 at 1635 hours under s 117(3) of the Criminal Procedure Code. The defendant was informed that he was charged with the possession for the purpose of trafficking of 150.50g of methylamphetamine contrary to s 3A of the Misuse of Drugs Act. The defendant simply said he wished to give evidence in court. C

Hj Latif's evidence

32. He is 50 years old and earns a living operating a passenger boat commonly known as a water taxi. Previously, he had served as a police constable. He was convicted of consuming a controlled drug contrary to s 6(b) of the Misuse of Drugs Act in 1993 and syabu was found in his house in a raid by narcotics officers in 2003. He knows the defendant as they both live in Kampong Tamoi Ujong. D

33. It was Hj Latif's evidence that on the evening of 10 December 2005 he went to a *berbedak* (Malay wedding ceremony) with his wife and child. After the *berbedak* he went home and did not go out again. He never met the defendant that night and did not go on a boat with him to the Kampong Bandung jetty. Subsequently, ANO Pg Othman came to his house to ask him to go to the NCB. He was shocked and went to the NCB to give a statement on 20 December 2005. E F

34. In cross-examination Hj Latif disagreed he had called the defendant on at least three occasions that night between 9pm to 9.30pm, that he had asked the defendant to take him to Tumasek jetty because the light of his boat was not working, that the defendant at first said he was not sure as he had to find out if he could use his son's boat, that later the defendant confirmed he would pick him up using his son's boat, that the defendant picked him up at 10.30pm and dropped him off at the jetty, that he left the black plastic bag containing the drugs with the defendant telling him he was just going to meet someone and to wait for him, that as he was walking along the jetty he exchanged greetings with Hj Mansor who was in his boat, that he told Hj Mansor he was just going to the car, and that he was the informer who had called ANO Hairman on his mobile phone and framed the defendant. G H

Analysis of the crystalline substances

35. Ak Helmy is a scientific officer at the Department of Scientific Services (DSS). He qualified with a Bsc Hons in Forensic Science from South Bank University, London. In his s 117B statement dated 22 February 2006 he stated he had been working at the DSS for more than three years. In evidence he said he had received training in the operation of instruments and analysis of controlled substances in Singapore and Thailand in 2004. I

36. On 12 December 2005 Ak Helmy received exh E1, the black plastic bag containing the three packets of crystalline substances, from ANO Pg Othman for analysis. Ak Helmy prepared an analyst report dated 28 December 2005 in which he stated that upon analysis the crystalline substances in the three packets totalling 146.28g was found to contain 109.27g of methylamphetamine (commonly known as syabu), a class A controlled drug.

37. As the method used by Ak Helmy in arriving at his findings was strongly challenged by the defence it is necessary to set out the evidence relating to the analysis of the crystalline substances in detail.

38. It was the evidence of Ak Helmy that the three packets of crystalline substances were weighed separately. Only the crystalline substances were weighed and not the packets. The first packet, E1(a), weighed 47.963g, the second packet, El(b), 49.509g, and the third packet, El(c), 48.810g.

39. There were three tests conducted. The first test carried out was a presumptive colour test for each of the contents of the three packets. One sample was taken from each packet for this test. All three samples were found to be 'presumptive positive' for methylamphetamine.

40. The second test conducted was a confirmatory or qualitative test to identify the contents of the three packets of crystalline substances. This test was positive for methylamphetamine.

41. The DSS has a manual for use in the analysis and identification of narcotics but it has not been officially released as there are 'some parameters' still missing. For the most part the DSS manual follows the recommendations of the United Nations Office on Drugs and Crime (UNODC) in its manual published in 1987 titled 'Recommended Methods for Testing Amphetamine and Methamphetamine'.

42. Minute amounts of crystalline substances were obtained from each of the three packets for the three tests. For the presumptive colour test a prepared reagent supplied by NIK was used.

43. In respect of both the qualitative and quantitative tests, the Gas Chromatography — Mass Spectrometry (GC-MS) technique was used. One sample was taken from each packet for the qualitative test whilst seven samples were taken from each packet for the quantitative test.

44. According to Ak Helmy the proper method to analyse and identify narcotics like methylamphetamine when the suspected substance is in crystalline or tablet form is to firstly crush it into a very fine powder. This is the method of homogenization which meets current international standards and it was adopted by the DSS sometime in 2006. However, it was not the method used in the analysis of the crystalline substances in this case in 2005.

45. At that time the process of homogenization according to DSS guidelines involved the manual stirring of the whole content of each of the three packets of crystalline substances using a mortar and pestle. After that the 'stirred or homogenized' sample was spread over a thin aluminium foil as evenly as possible and this was then divided into seven portions as evenly as

possible. From the seven portions the required amount was taken randomly and transferred into a clean glassware for analysis. A

46. There is a basic rule for sampling. The decision on the number of samples to take is determined by the square root of the gross weight of the packet of substances. As to the quantity of the samples there is a 'standard tabulated figure' which is relied upon to decide what amount to collect. This sampling process was in accordance with UNODC recommendations. B

47. The document with the heading 'Calculation Worksheet for Methylamphetamine' (P16) shows the GC-MS readings for each accepted sample, the calculated percentage purity of methylamphetamine for each sample, and the average percentage purity and methylamphetamine content of each of the packets E1(a), E1(b) and E1(c). C

48. In respect of E1(a) the percentage purity values of the accepted samples are between 67.45%–81.05% whilst for El(b) they are from 75.16%–81.03%. In E1(c) the percentage purity values of the seven samples are between 65.44%–84.32%. D

49. Sample No 5 from E1(a) and sample No 7 from E1(b) were omitted from the data because an 'Outliers' test showed that the value of the readings for these two samples fell outside the accepted value. The readings can be seen in the document titled 'Rejection of Outliers Test' (P16A).

50. The 'Outliers' test determines whether there is a need to reject any readings in a set of data. It also identifies which reading to exclude from the data. There is a given limit for a particular set of data and if the value of the 'Outliers' test for a reading is greater than the limit value then it is said to fail the test and can be omitted from the set of data. E

51. The average purity value of each of the three packets is as follows: E1(a) 73.60%; E1(b) 77.16%; and E1(c) 73.29%. The methylamphetamine content of each of the three packets is as follows: E1(a) 35.299g; E1(b) 38.199g; and E1(c) 35.775g. F

52. It is normal to have variation in purity content because the process of manufacturing methylamphetamine is a fast process and there will be a tendency for inconsistency in the mixture of ingredients. G

53. As to whether there was an international standard for the homogenization of crystalline substances in 2005, Ak Helmy at first said there should be but he was not sure what it was. He then said the method of homogenisation of crystalline substances by the DSS in 2005 did meet international standards. Later, he said there was actually no international standard for homogenisation of crystalline substances in 2005 although he had seen standards to homogenise substances in powder form, tablets and capsules. He believed the DSS derived a method for homogenising crystalline substances 'based on the requirement by the law' that the originality of the sample he preserved. H I

54. Ak Helmy opined that there might be a 'slight difference' in the analysis result between a homogenised crystalline substance and a substance homogenised into fine powder. He said: 'For fine powder form it is true it

would be more homogenised and the variation of the percentage purity among the sampling done would be more precise and therefore might result in higher average percentage purity. As for the circumstances where the percentage purity would be lower, it depended on how the grinding of the homogenisation process took place. If the sample, the crystalline substance, was allowed to evaporate from this process there would be a clear loss of methylamphetamine content. Therefore, it would lower the percentage purity'.

55. According to Ak Helmy if, for example, the percentage purity variation for homogenised crystalline substance was around 60%–80%, the variations for fine powder would be smaller: 70%–80%. He had 'no doubt' about the 'old method' because from his experience there was 'not much difference' between the 'new method' of homogenising into fine powder and the 'old method': the normal trend of methylamphetamine content in Brunei was in the range of 70%–80%.

56. He said the process of homogenising crystalline substances by manually stirring it with a mortar and pestle adopted by the DSS in 2005 was also used by laboratories in Singapore and Hong Kong. During his visit to the Singapore Health Sciences Authority in 2007 he observed from their manual that the mortar and pestle were still being used to mix samples for quantitative analysis.

The UNODC manuals

57. The 1987 UNODC manual at p 10 under the heading 'sampling' states:

> There may be situations where, for legal reasons, the normal rules of sampling and homogenisation cannot be followed if, for example, the analyst wishes to preserve some part of an exhibit as visual evidence.

58. On the same page under the heading 'Sampling of single package items' it states:

> The simplest sampling situation is where the submitted item consists of a single package of material — in the case of amphetamine or methamphetamine, the material will most often be a powder. The material should be removed from its container or wrappings, placed in a clean clear plastic bag and the net weight recorded. The material should be thoroughly homogenized prior to the application of the sequence of chemical tests, although presumptive testing may be applied at this stage if it is thought that the sampling or homogenisation process will be lengthy and there is still some doubt as to the identity of the material. The simplest way to homogenize a powder is to shake it thoroughly within the clear plastic bag to which it has been transferred. If the powder contains aggregates these may be broken down by passing through successively finer sieves, or by pounding with a mortar and pestle, or by use of an adapted commercial food-mixer or food-processor.
>
> Alternatively, the technique of coning-and-quartering can be applied, as follows: the sample is mixed by shaking or stirring. Large fragments are

reduced if necessary; the material is then poured on a flat surface to form a cone. The 'cone' is flattened and the material is then divided at right angles, forming quarters. Opposite quarters are taken for a sample; the remainder of the material is returned to the receptacle from which it was removed. Should further coning-and-quartering be desired to reduce sample size, particle sizes are further reduced, the material mixed thoroughly, poured onto a flat surface, and divided as before.

59. At p 12 under the heading 'Sampling of materials containing gummy or large aggregates' it states:

If the particles can be easily reduced to powder, then this approach should be used and sampling procedure followed as outlined previously. Powdering may be achieved by mortar and pestle, commercial food processor/mixer, or industrial grinder. If the material cannot be easily broken down, then random sized particles should be drawn from at least three different parts of the item. A minimum of 1g should be collected, weighed accurately and subjected to assay.

60. In 2006 the UNODC published a revised and updated manual on recommended methods for identification and analysis of various groups of drugs. This manual does not mention anything about sampling and it is necessary to look at the recommendations of the 1987 manual on the subject.

61. Mr Victor Keasberry obtained his Msc in Clinical Biochemistry from the University of Surrey in 1980 and worked as a medical biochemist in the General Hospital in 1981. He was instrumental in setting up the narcotics laboratory in 1987 and received training in the Narcotics Laboratory in Singapore and the United Nations Laboratory in Vienna. In 2002 he became the director of the DSS and his role at the time included the training of staff and general supervision of all the laboratories of the department. In 2006 he was transferred to the office of the Minister, Ministry of Health, and the narcotics laboratory was then supervised by Ak Helmy and Mr Lim Swee Chin.

62. It is the opinion of Mr Keasberry that the sampling technique used by Ak Helmy in this case is acceptable and within the UNODC guidelines. He said: 'Spreading the samples by use of the pestle and mortar and taking seven samples from each exhibit is generally an acceptable method to give an accurate analysis of the exhibits. In the laboratory aggregates would mean clumps of crystals and homogeneity would mean getting a consistent representation of the exhibit. In my opinion using a blender to crush the crystals into powder would only improve the specificity of the analysis slightly. The accuracy of the analysis will remain the same. A forensic chemist will normally like to keep the exhibits intact as far as possible to its original form, for visual purposes'.

63. In cross-examination Mr Keasberry disagreed that the DSS in the present case did not follow the 1987 UNODC guidelines in homogenizing the crystalline substances. He said: 'The issue in the lab is to get a fair

representation of the exhibit and in following the UN guidelines as close as possible. In this case he (Ak Helmy) obtained three injections from each of the seven samples and I think that is a fair and accurate representation. When I was in Vienna I was told these are guidelines and not the bible. It depends on your lab and your equipment. The important thing is to have a fair representation'.

64. Mr Keasberry agreed that in respect of the third packet of crystalline substances, E1(c), there is almost a 20% variation in the percentage purity of the samples. He said: 'There is a variation. But you have to understand when you are dealing with very big values, if you have variations, that would be very crucial. But when you are talking of very small values, and you are talking of nanograms here, you will see variations but you are looking at very small numbers so that is why you have averaging to get a fair and accurate result'.

Street value

65. NO Jali prepared a report on the street value of the 146.28g of methylamphetamine. On the basis that one packet containing 70g of the drug is sold for $50 the street value of the drugs would be over $100,000.

Defence case

66. The defendant lives with his wife and children in a house belonging to his father-in-law in Kampong Tamoi Ujong. He gave evidence that he earned a living by operating a workshop repairing boat engines during the day and running a water taxi service in Kampong Ayer in the evenings.

67. He recounted that on the evening of 10 December 2005 he attended a friend's wedding in Kampong Ayer. Whilst he was there he received a phone call at about 9.15pm from Hj Latif, whom he had known for over 17 years, asking him for a lift to Tumasek jetty. He told Hj Latif that his boat had no fuel but he would use his son's boat if it was available.

68. After the wedding the defendant went home. He said he received one or two phone calls from Hj Latif again. He was reminded by Hj Latift to pick him up for the trip to Tumasek jetty. He informed Hj Latif he would be using his son's boat to do so as soon he was ready. Then, his brother-in-law Murni bin Hj Zainal (Murni) and his wife visited. They asked him to take them to Tumasek jetty and he obliged.

69. Upon arriving at Tumasek jetty at about 10.30pm he noticed his neighbour Hj Mansor bin Othman (Hj Mansor) waiting in his boat on the left side of the jetty. After dropping off Murni and his wife, and as he was leaving the jetty, he greeted Hj Mansor and asked what he was doing there. Hj Mansor replied he was waiting for his daughter. From the jetty he went to Hj Latif s house to pick him up.

70. Hj Latif got into the defendant's boat and they set off for the jetty. It was a short trip of about a minute. As they approached the jetty Hj Latif handed a black plastic bag to the defendant and asked him to 'look after it for a short while' as he needed to go to meet a friend.

71. The defendant said as he had known Hj Latif for 'such a long time' and they lived in the same village he did not think there was anything suspicious and agreed to keep the black plastic bag. He kept the black plastic bag next to him on the floor of the boat after Hj Latif had gone up the jetty. He had a glance at the contents of the black plastic bag and although it was dark at the time he observed that it 'looked like some stones'. He did not know what they were and 'was not interested' because it was not his.

72. As the defendant was waiting for Hj Latif to return to the boat a man whom he did not recognise came. He said he asked the man where he wanted to go. The man told him to wait as he had left his wallet in his car. The man walked towards the car park. Soon after that the man returned to the boat followed by two other men carrying fishing rods. The man said he wanted to go to Kampong Pandai Besi which would take a couple of minutes. He had a short conversation with the man about fishing.

73. Before he could move his boat the man tried to grab his hand and identified himself as a narcotics officer. This 'immediately triggered off a suspicion' in his mind about the black plastic bag. The defendant said: 'I must admit that in my shock I panicked and grabbed hold of the black plastic bag Hj Latif had given me to hold for him and threw it off the boat as the bag was not mine and I did not want any problems'. His suspicion was based on the fact he knew Hj Latif had been involved in drug cases and had previous convictions for drug offences.

74. After the black plastic bag was retrieved from the river the defendant immediately told the narcotics officers that it belonged to Hj Latif. But they told him that he could give his statement in the NCB office. He said: 'They threatened me to keep quiet about Hj Latif and not say anything'.

75. Hj Mansor was still waiting in his boat on the left side of the jetty at the time and when his daughter arrived they quickly left. Before that the defendant managed to call out to them to inform his family of his arrest but a narcotics officer told them not to say anything and threatened them.

76. On the way back to the jetty with the black plastic bag the defendant was questioned by NO Kamran. The defendant said: 'He kept asking me what was inside the black plastic bag and saying that I knew what was inside that black plastic bag. He kept saying that I knew there were 'Batu' in there. I kept saying that the black plastic bag was Hj Latif s as he had left it on my boat and I agreed with him that there were 'Batu' in there after being shown the contents. I wish to state very clearly that I did not mean syabu by agreeing to the word 'Batu". His possessions which included money, waist pouch and mobile phone were seized by the narcotics officers.

77. At the jetty one of the narcotics officers started recording in a pocket diary. The defendant was asked to read and sign each page of the pocket diary. Although he agreed to sign most of the pages he refused to sign entry 34 which stated he had taken the black plastic bag from his pouch as this was not true. And what he had told the narcotics officers about Hj Latif had not been recorded in the pocket diary.

78. From the jetty the defendant was taken to the NCB office in Gadong where his ordinary statement was recorded. He told the recording officer everything that had happened; that Hj Latif had left the black plastic bag in his boat; that he had dropped off Murni and his wife at the jetty before going to pick up Hj Latif; and that Hj Mansor and his daughter were at the jetty. But the recording officer had only recorded what the defendant had told him about Hj Latif and when he enquired why there was no record of the other persons mentioned, he was told it was just an ordinary statement.

79. The defendant said he was carrying a mobile phone that night but it was seized from him after his arrest. It would have a record of the calls from Hj Latif. Concerning the charge against him the defendant said it was a 'premeditated crime masterminded by Hj Latif'. He said he had never seen syabu before except on television and he was not a drug trafficker, consumer or buyer.

80. In cross-examination the defendant agreed he had a close relationship with Murni and Hj Mansor. But he disagreed that because of that the two of them had lied about being present at the jetty that night.

81. Three witnesses gave evidence on behalf of the defendant. The first was Hjh Nooraini bt Hj Mansor (Nooraini) who is aged 25 and works as an immigration officer. She lives with her parents in Kampong Tamoi Ujong. She gave evidence that on the night of 10 December 2005 she went out with her friends to the cinema. Her father, Hj Mansor, had agreed to pick her up in his boat at the Tumasek jetty to take her home after the movies.

82. Hjh Nooraini said she arrived at the Tumasek jetty at about 10.45pm in a car with three friends. In the car park she saw Hj Latif whom she had known for a long time since he also lives in Kampong Tamoi Ujong, walking pass the car she was in. Shortly after that she saw several men running towards the jetty. She was 'shocked and felt afraid' and two of her friends accompanied her to the jetty. She was in a 'state of fright' when she got on her father's boat and he mentioned the name 'Haji Jiri' which is the defendant's nickname. She said: 'I felt so frightened that I cried because I did not know what had happened to Hj Khudzairi'.

83. She has known the defendant since she was a child. They are neighbours and she and her family had looked after the defendant's baby while his wife was at work.

84. Hj Mansor said that whilst waiting in his boat at the jetty for his daughter he noticed two men fishing there with a 'ball of string'. They did not have fishing rods. He then saw the defendant arrive in his boat carrying Murni and his wife. He exchanged greetings with the defendant and Murni. The defendant left the jetty while Murni and his wife walked to the carpark.

85. A few minutes later the defendant returned to the jetty, this time with Hj Latif in his boat. Hj Mansor said he spoke to Hj Latif as he got off the boat. Hj Latif indicated that he wanted to go to his car. Hj Mansor said he then saw the arrest of the defendant by narcotics officers although he did not know who they were at the time. His daughter had just got on his boat and was crying because she was frightened. One of the narcotics officers told

them in a 'very strong voice' not to inform the defendant's family about the incident. He went home and did not go out for a few days because he was in fear.

86. In cross-examination, to the question, 'Do you agree your family and the defendant's family are good neighbours and close?' Hj Mansor answered, 'I would not say that. I was only babysitting the child'.

87. Murni recalled that on the night of 10 December 2005 at about 8.30pm he and his wife attended a relative's wedding reception in Kampong Ayer and the defendant was there too. Later, at about 10pm he and his wife went to the defendant's house. He asked the defendant for a lift to Tumasek jetty and the defendant agreed.

88. On the way to the jetty Murni said he did not see the defendant carrying a black plastic bag. Arriving at the jetty he saw two men who appeared to be fishing, one with a fishing rod and the other with a 'ball of string'. He also saw Hj Mansor in his boat on the left side of the jetty and they exchanged a few words before he and his wife went to the carpark.

89. In the car park Murni said as he and his wife were going to their car he saw several men, whom he thought could be police or other law enforcement officers, coming out of a 'Pajero' vehicle. He 'did not think much of it' and went home.

[4] The court made the following findings:

95. The line of defence taken was that the defendant knew nothing about the drugs in the black plastic bag and he is not a drug dealer: he was the victim of a frame up 'masterminded' by Hj Latif who had persuaded him to 'look after it (the black plastic bag containing the drugs) for a short while'.

96. It was also the submission of Mr Prabhakaran on behalf of the defendant that the narcotics officers involved in this case were either knowingly or unwittingly parties to the frame up. He concedes that the submission it is possible the narcotics officers actively participated in the frame-up is a bold one to make.

97. We have seen and heard the witnesses testify and reviewed their evidence in entirety. We have also given consideration to the documentary evidence. We have come to the following conclusions.

98. On the material issues we have no hesitation in accepting the evidence of the narcotics officers who were called as being truthful and reliable. We recognise there are discrepancies in the evidence of several of these witnesses and inconsistencies between some of them but they do not detract from the veracity and reliability of their evidence on the key issues.

99. We accept the evidence of ANO Hairman concerning the information he received which led to the defendant's arrest and that the informer was someone from his village and not Hj Latif

100. Mr Prabhakaran submits that it is highly suspicious that the narcotics officers knew exactly what time to go to the jetty when the informer did not disclose when the defendant's boat would arrive.

101. The information ANO Hairman received from the informer was that 'Hj Giri' would be using a red boat with the mark '777' to go to the jetty that night on 10 December 2005. It is true that no time was mentioned and the defendant arrived at the jetty shortly after the narcotics officers had positioned themselves at the scene. But we see nothing suspicious about that. The narcotics officers went to the jetty that night as soon as they had been briefed by SNO Sabtu in order to carry out surveillance as a result of the information received.

102. Mr Prabhakaran argues that ANO Hairman's failure to record the information he received is a 'blatant contradiction' of s 111 of the Criminal Procedure Code and 'reduces' the credibility of his evidence. We do not think ANO Hairman 's omission to reduce the information to writing affects his credibility.

103. Moreover, in our opinion, ANO Hairman was not obliged to keep a record of the information he received as s 111 does not apply on the facts. Section 111 is in these terms:

(1) When information is received at a police station relating to the commission of an offence, being an offence of which it appears that no previous information has been received in the station, the officer in charge of the police station or a subordinate officer whose duty it is to receive reports shall proceed according to one of the following subsections.

(2) If the information is in writing, he shall forthwith mark on it the date and time of receipt, and, if practicable, the name and address of the person (other than a postal messenger) by whom it was delivered, and if it purports to be signed by the informant, he shall file it as a report and record the facts in a book kept for this purpose.

(3) If the information is given orally and he considers it practicable to reduce it to writing forthwith, he shall record or cause to be recorded in a book kept for this purpose a report containing the name and address of the informant, the date and time of his arrival at the station, the substance of the information and such other particulars as the nature of the case may require, and such report shall be signed by the informant, (or if he refuses to sign a note of such refusal shall be made with any reasons given for such refusal), by the recording officer and by the interpreter, if any.

(4) If the information is given orally and it appears to him impracticable to proceed forthwith under subsection (3) he shall immediately make a note of first information in the station diary, and, if an investigation is to proceed, as soon thereafter as circumstances permit, a fuller statement by the informant shall be recorded under the provisions of subsection (3).

104. Section 111 concerns what is commonly known as the first information report and is usually made by an informant after the occurrence of an offence and this is required to be reduced to writing in a 'book kept for this

purpose'. It provides the basis for the police to start criminal investigations although it is not a condition precedent for the police to act: see *Emperor v Khwaja Nazir Ahmad* AIR 1945 PC 18.

105.We know of no requirement or authority whereby information from an anonymous informer of the possible commission of an offence must be reduced to writing by the law enforcement officer receiving it.

106.Turning to what happened at the jetty that night we accept the oral evidence of ANO ZulMajdi, ANO Sukarni and ANO Jamarul given in court of the events leading to the defendant's arrest. We think the s 117B statements of these witnesses, suggesting that all three of them immediately boarded the defendant's boat when it arrived, do not give an accurate picture of what transpired that night but we disagree with Mr Prabhakaran's submission that the contradiction shows they wanted to hide the truth.

107.We reject the defence contention that the reason why ANO ZulMajdi stayed at the car park was to wait for Hj Latif to signal or 'confirm in words' that the drugs were in the defendant's boat without arousing the defendant's suspicion. In our opinion, if this was a frame up and confirmation that the drugs were in the boat before arrest was made was necessary, an innocent hand gesture or nod of the head from Hj Latif would have sufficed and this could easily be done at the jetty in the presence of the defendant without alerting him.

108.It might arguably have been simpler for all three narcotics officers to wait at the jetty to effect arrest of the defendant immediately upon his arrival. But we accept the evidence of the narcotics officers concerned that they were in their respective positions prior to the arrest because that was the plan for the defendant's apprehension. We accept the evidence of ANO ZulMajdi that from his position in the car park he was able to see the colour of the defendant's boat as it approached the jetty and he was able to identify it once he boarded it.

109.On the evidence of the same three narcotics officers, which we accept, we find that the defendant in the course of resisting arrest on the boat did use his right hand to take a black plastic bag from a pouch attached to his waist which he then threw into the river. We accept the evidence of ANO ZulMajdi that he retrieved the black plastic bag from the river after the defendant's arrest.

110.We do not accept Mr Prabhakaran's contention that both ANO ZulMajdi and NO Kamran lied when they said they did not know who Hj Latif was. The NCB memorandum (D3) shows that ANO ZulMajdi was one of the narcotics officers who raided Hj Latif's house in 2003. This document was only made available to the defence after ANO ZulMajdi had given evidence. Mr Prabhakaran complains that the witness was 'never recalled to explain his lie in light of exh D3'.

111.There is no merit to that argument. It was for the defence and not the prosecution to recall the witness to examine him on that issue if it was thought to be necessary. We do not think ANO ZulMajdi lied: it is possible he did not remember, as is the case with NO Kamran, who was only able

to recollect he was the investigation officer in Hj Latif's case after being shown the record of convictions (Dl). We do not believe that these two witnesses had lied in order to distance themselves from Hj Latif

112. We are satisfied on the evidence of NO Kamran and ANO Abasni that the black plastic bag which contained three plastic packets of crystalline substances (the drugs) retrieved from the river was handed over by the former to the latter at the jetty. We think ANO ZulMajdi was in error when he said he handed the drugs to ANO Abasni.

113. Mr Prabhakaran submits there has been 'wanton disregard' by the NCB in ensuring the chain of possession of the drugs remains intact. We disagree. We accept the evidence of ANO Abasni, ANO Pg Othman and ANO Hartina concerning the movement of the drugs from the time ANO Abasni received it to the time the drugs were handed to Ak Helmy at the narcotics laboratory for analysis.

114. It is the contention of the defence that there is no written record of the drugs being deposited into the exhibit room on 11 December 2005 at 0205 hours. On this issue we accept the evidence of ANO Hartina that no description of the drugs was recorded in the exhibit handover book at the time the drugs were deposited in the exhibit room; instead, the handing over form prepared by ANO Abasni earlier which listed, among other items, the drugs, was simply attached to the exhibit handover book; and the details of the drugs were later recorded in the exhibit handover book on 15 December 2005 by ANO Maswemah.

115. Mr Prabhakaran also submits it is 'rather odd' that in the exhibit handover book there are two 'Exhibit (OUT)' stamps but only one 'Exhibit (IN)' stamp in relation to exh E2 (the money seized from the defendant).

116. The criticisms made about the manner in which the record in the exhibit handover book is kept are valid. We must say such a lackadaisical attitude in keeping a record of the movement of exhibits in and out of the exhibit room is to be deprecated. Nevertheless, on the evidence of ANO Hartina we have no doubt in our minds that the drugs, which ANO Abasni handed to ANO Pg Othman who then gave it to ANO Hartina, were deposited in the exhibit room on 11 December 2005 at about 0205 hours.

117. An example of the 'shoddy handling' of exhibits, so Mr Prabhakaran argues, is the way in which the defendant's urine sample was handled. The analyst certificate (P28) relating to the defendant's urine specimen reveals that it was collected on 11 December 2005 at 0205 hours.

However, ANO Pg Othman gave oral evidence that the defendant's urine specimen was collected on 12 December 2005 at 0205 hours and that the urine record book showed the urine specimen was put in the exhibits room on the same date at 0215 hours.

Mr Prabhakaran posed the following question:

What happened to the urine box between the time the urine was collected on 11 December 2005 at 0205 hours and the time when the urine box was deposited in the exhibit room on 12 December 2005 at 0215 hours?

118. The short answer to that question, in our opinion, is that ANO Pg Othman was clearly wrong about the date of collection of the urine specimen and the date the same was put in the exhibit room in his oral evidence. And the urine record book is also inaccurate. It is evident from ANO Pg Othman's s 117B statement that the defendant's urine specimen was collected at 0205 hours and put in the exhibit room at 0215 hours on the same day, ie on 11 December 2005. ANO Pg Othman said at para 4 of his s 117B statement:

> On 11.12.05 (Sunday) at about 0145 hours, I as the investigating officer on duty received an arrestee named Hj Md Khudzairi bin Hj Marfuji (arrestee) together with the seized items ...

119. At para 6 he said:

> On the same date at about 0205 hours, I handed over the seized items ...

120. And he continued at para 7:

> Normally, each arrestee's urine sample will be taken. At that time I was also the Head of the Urine Team on duty (standby). I instructed ANO Hj Hairman to escort the arrestee for his urine sample to be taken at the NCB toilet while ANO Pg Seri Saiful Bahri was the Diary Officer. Later, I instructed the arrestee himself to lock the urine box registration BKN/ENF/D12-02-02 containing a bottle of his urine sample. Later, I handed the urine box to ANO Hartina to be kept in the exhibit room.

121. There was evidence that apart from ANO Hartina the only other person who had the key to the exhibit room was ANO Maswemah. Mr Prabhakaran submits that ANO Maswemah is a very important witness in proving the chain of custody of the drugs and the failure to call her to give evidence leaves a gap in the prosecution's case: the court should draw an adverse inference against the prosecution under s 114(g) of the Evidence Act.

122. In our opinion that submission is misguided. There is no basis whatever for drawing an adverse inference against the prosecution for not calling ANO Maswemah to give evidence. Although the prosecution did not offer ANO Maswemah to the defence, her existence and the role she played in the case was known to the defence. There is no suggestion that the prosecution had in any way withheld evidence from the defence or the court. It was clearly open to the defence to call ANO Maswemah as a defence witness: see *Yeo Choon Huat v Public Prosecutor* [1998] 1 SLR 217.

123. On the evidence we are satisfied there is no break in the chain of evidence regarding custody, handling, storage and delivery of the drugs from the time of retrieval at the scene to the time of analysis at the narcotics laboratory; the drugs were not tampered with (notwithstanding Mr Prabhakaran's complaint that the zip lock bag in which the drugs were kept was not 'sealed properly'); and the drugs analysed were the same drugs which the defendant threw in the river.

124. Mr Prabhakaran has made much of the defendant's mobile phone which ANO Pg Othman said he took custody of at the NCB office when the

defendant was brought to him. Firstly, it is submitted that both NO Kamran and ANO Abasni had lied when they 'vehemently denied' finding a mobile phone on the defendant.

125.That submission is not altogether correct. In cross-examination NO Kamran did say he did not find a mobile phone on the defendant. But ANO Abasni's evidence was that he did not know if a mobile phone was found on the defendant. We do not think either of these two narcotics officers had lied. The defendant himself in evidence did not disclose who had taken his mobile phone from him. ANO Pg Othman said from his recollection it was the defendant who handed to him his 'personal belongings' which included the mobile phone.

126.Secondly, it is the contention of Mr Prabhakaran that ANO Pg Othman's failure to investigate the history of the calls made and received with the mobile phone has 'denied the defence a crucial piece of evidence to prove his innocence' and 'leaves another gap' in the prosecution's case.

127.We are unable to agree on both counts. Even on the assumption there was some information of calls stored in the mobile phone it is entirely speculative whether it would be of any assistance to the defence. It does not warrant speculation in the defendant's favour or against him. We should also mention that there was evidence from ANO Pg Othman that the defendant's 'personal belongings' which would include the mobile phone were returned to the defendant's family. Therefore, it cannot be said that the NCB had suppressed evidence from the defence. And we do not think the failure of ANO Pg Othman to investigate the mobile phone has left any gap in the prosecution's case: there is ample evidence to support the charge against the defendant.

128.Turning now to the issue of the quantity of the drugs, Mr Prabhakaran argues that the prosecution has not proven that the three packets of crystalline substances contain 109.27g of methylamphetamine because the method used in the analysis of the drugs was flawed. Relying on the decision of the Singapore High Court in *Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1, Mr Prabhakaran submits that homogenisation by way of 'pulverization into fine powder is an absolute necessity' before testing the drugs.

129.There was much argument about the meaning of the word homogenise. Referring to *Websters Ninth New Collegiate Dictionary*, Mr Prabhakaran submits it means '(a) to blend (diverse elements) into a uniform mixture, (b) to reduce small particles to uniform size and distribute evenly usually in liquid, (c) to reduce the particles so that they are uniformly small and evenly distributed and homogenous means of the same or similar kind or nature or of uniform structure or composition throughout'.

130.The prosecution relies on the following definition of homogenise in the online *Oxford English Dictionary*: (i) of one thing in respect of another, or of various things in respect of each other; of the same kind, nature or character; alike, similar congruous, (ii) of a thing in respect of its constitution consisting of parts or elements all of the same kind; of uniform

nature or character throughout ...' The Deputy Public Prosecutor Pg Jasmine suggests that the word homogenize implies 'mixing' and not 'blending'. A

131.We think the meaning of the word homogenize is clear. It simply means to blend (which also means to mix: see *Oxford Advanced Learner's Dictionary of Current English*) into a uniform consistency. B

132.It is the process of homogenisation in the context of the analysis of crystalline substances containing methylamphetamine that is controversial. As the analysis of a drug such as methylamphetamine requires a very small amount of material it is vital that these small samples be entirely representative of the content of the bulk from which they have been drawn. C

133.As we understand it Mr Prabhakaran's argument in essence is that since the 1987 UNODC manual in discussing the homogenisation process recommends that if a 'powder' contains 'aggregates' these 'may be broken down' by 'pounding with a mortar and pestle, or by use of an adapted commercial food mixture or food processor' it would be logical that crystalline substances should be similarly treated. D

134.In our judgment even assuming that the UNODC recommendation for homogenisation of crystalline substances is the method advocated above, it does not follow that the process of homogenisation adopted by Ak Helmy, of manually stirring the whole content of each of the three packets of crystalline substances using a mortar and pestle, is necessarily or inherently flawed. E

135.Both the 1987 and 2006 UNODC manuals emphasise that not all the methods described in the manuals need to be applied. In the 1987 UNODC manual under the title 'Use of the Manual' it is stated: F

> Few methods are perfect, least of all in forensic drug analysis where the materials under examination are very likely to show significant variation both in their physical form and chemical composition. The choice of methodology and approach to analysis remains within the control of the analyst working within his or her own country. The analyst alone has seen the suspect material and can best judge the correct approach to the problem at hand. Furthermore the choice of methods may necessarily depend on the availability of reference materials and of instrumentation. G
>
> Not all the methods listed need to be applied to all samples suspected to contain amphetamine or methamphetamine. Requirements may vary, for example, as a result of local trends in samples encountered, facilities available, and the standard of proof acceptable in the prosecution system within which the analyst works. The more complex methods are needed only for certain forensic requirements, such as comparison of samples or for source determination. H I

136.In our view both Ak Helmy and Mr Keasberry possess the necessary qualifications and experience to give expert evidence in the field of drug analysis. Unlike the case of *Public Prosecutor v Ang Soon Huat*, there is no defence expert evidence here. Nonetheless, we have given careful

consideration to all of Mr Prabhakaran 's submissions on what has been described as 'very serious shortfalls' in the DSS. We should make it clear that the defence, of course, is not obliged to adduce any expert evidence.

137.We acknowledge that Ak Helmy's evidence as to whether there was an international standard for homogenisation of crystalline substances in 2005 is unclear and unsatisfactory. He was, in our opinion, under the misguided belief that the law then required the preservation of the originality of drug exhibits. We take note of his evidence that as from 2006 the DSS in the analysis of crystalline substances containing methylamphetamine adopted a method of homogenisation which involved crushing the substances into powder.

138.Ultimately, the question still, is whether the process of homogenisation used in the present case, of manually stirring the crystalline substances, coupled with the sampling method (which complied with UNODC sampling recommendations), provided samples for analysis which accurately represented the contents of the three packets of crystalline substances.

139.Having reviewed the evidence of Ak Helmy and Mr Keasberry, and the material in the UNODC manuals, we would unhesitatingly answer that question in the affirmative. We are satisfied the analysis result is accurate and reliable and that the three packets of crystalline substances contain 109.27g of methylamphetamine.

140.The defendant did not impress us as a credible witness and we reject his evidence that the drugs did not belong to him but to Hj Latif. We disbelieve his evidence that he was the victim of a frame up orchestrated by Hj Latif. There was no frame up. We find Mr Prabhakaran's suggestion that it is possible the narcotics officers had taken part in the frame up quite astonishing.

141.We believe the defendant contrived his evidence about Hj Latif calling him on his mobile phone and taking Hj Latif to the Tumasek jetty on the night of 10 December 2005. We disbelieve the defendant's account of how he was persuaded by Hj Latif to 'look after' the black plastic bag containing the drugs.

142.The defendant's story that he was 'not interested' in the contents of the black plastic bag, which he claimed Hj Latif had handed to him, even when he had seen that 'it looked like some stones were in there' but he did not know what they were, is simply incredible. We think he made up this story about Hj Latif to give credence to his defence of a frame up as he knew of Hj Latif's drug convictions.

143.In our opinion the defendant also concocted his evidence about taking Murni and his wife to the jetty, and the presence of Hj Mansor and his daughter there, that night. None of the narcotics officers who were at the jetty gave evidence that they saw any of the persons (Hj Latif; Murni and his wife; and Hj Mansor and his daughter) mentioned by the defendant present at the jetty that night.

144. Turning to the defendant's ordinary statement we believe he fabricated his account of how he had taken Hj Latif to the jetty and that Hj Latif had left the black plastic bag in his boat. In this statement the defendant gave a puzzling answer to the following question: 'How many times have you accompanied Hj Latif bringing controlled drugs?' The defendant answered: 'Very seldomly (sic)'. The recording officer did not ask the defendant what he meant by this answer. Nor was the defendant examined on this answer in court. Lest it be said we have been influenced by this answer to the prejudice of the defendant, we wish to make it clear that we have ignored it.

145. We reject the defendant's evidence that when he gave his ordinary statement he had told the recording officer about taking Murni and his wife to the jetty that night, and that Hj Mansor and his daughter were there, but these details were not recorded and when he enquired about it he was told it was just an ordinary statement. We accept the evidence of the recording officer, ANO Ariffln, that the defendant did not mention those persons when he gave his statement.

146. The defendant admitted in evidence that he threw the black plastic bag containing the drugs into the river. He claimed that he grabbed the bag from the floor of the boat as he was being arrested. We do not believe the bag was on the floor of the boat. It is our finding that the bag was in the pouch around the defendant's waist. We believe the reason why he threw the bag was because he knew it was highly incriminatory evidence against him since he was carrying it, and not, as he asserted, from panic stricken fear of being wrongly accused of possession. We also believe he refused to sign entry 34 of ANO Jamarul's diary (which suggested the defendant had taken the black plastic bag out of his pouch) because he knew it would incriminate him.

147. We disbelieve the defendant's evidence that after the black plastic bag had been retrieved from the river he had protested his innocence by telling the narcotics officers it belonged to Hj Latif but was 'threatened' to keep quiet. NO Kamran who was cross-examined on this point disagreed the defendant had voiced such a protest and we accept his evidence.

148. And we also accept NO Kamran's version of what transpired when he questioned the defendant about the contents of the black plastic bag. We believe the defendant answered 'Batu' when questioned about the contents of the bag and 'syabu' when he was asked what he meant by 'Batu'. He gave those answers because he knew perfectly well that the black plastic bag contained syabu. We realize there is no record of the defendant's answer 'syabu' and NO Kamran's question which elicited it in ANO Jamarul's diary. Nevertheless, we think NO Kamran's evidence on the matter, which was corroborated by ANO Sukarni, is reliable. We would add this: even without the admissions we are satisfied on the evidence in totality that the defendant had knowledge of the nature of the drugs he was carrying in his waist pouch.

149. In our opinion the three witnesses who gave evidence on behalf of the defendant were also not credible witnesses. They can hardly be said to be

A disinterested witnesses, Murni being the defendant's brother-in-law and Hj Mansor and Nooraisah, the defendant's next door neighbours, and all of whom according to the defendant enjoyed a 'close relationship' with him. We disbelieve their evidence that they were at the jetty that night. We think they tailored their evidence to buttress the defence of a frame up.

B 150.Mr Prabhakaran submits that Nooraini's three friends who had accompanied her in the car to go to the jetty that night should have been called by the prosecution 'as rebuttal or further witnesses' to prove that Nooraini had lied about her presence at the jetty. Although agreeing with the defence submission that 'these three people would have shed light on
C what really happened and whether the prosecution's version of events was true or false', the deputy public prosecutor's response was that the 'duty' fell upon the defence to call them to give evidence and in failing to do so an adverse inference could properly be made against the defendant under s 114(g) of the Evidence Act.

D 151.In our view both submissions are misconceived. We have discussed the application of s 114(g) in relation to the defence submission on the failure of the prosecution to call ANO Maswemah. The comments we made on that occasion are apposite here. Neither the prosecution nor the defence was obliged to call the three friends as witnesses. Both sides knew of the
E existence of the three friends. It was open to either side to call them if it was considered necessary and the failure of either one to do so does not provide any ground for drawing an adverse inference under s 114(g).

152.At this juncture it is convenient to consider the submission of the prosecution that we should also draw an adverse inference against defendant
F because of his 'failure to state his case' in his s 117(3) statement.

153.Section 117(3) of the Criminal Procedure Code provides:

> Where any person is charged with an offence or officially informed that he may be prosecuted for it, he shall be served with a notice in writing, which
G shall be explained to him, to the following effect —
>
> You have been charged with/informed that you may be prosecuted for —
>
> (set out the charge)
>
> Do you wish to say anything in answer to the charge? If there is any fact on
H which you intend to rely in your defence in court, you are advised to mention it now. If you fail to do so before your trial, the court may draw such inferences, adverse to you, as it may think proper. If you wish to mention any fact now, and you would like it written down this will be done.

154.Reference was made to the following passage of the judgment of Roberts CJ
I and Downey JC in *Public Prosecutor v Lamat bin Burut & Anor* [1992] JCBD 113 at p 134:

> It is, of course, correct that this section has made substantial changes to the accepted principles of common law. In particular, the right of silence of a defendant has disappeared in the sense that adverse inferences may be drawn

from his refusal to put forward matters in his favour after a warning has been issued to him under s 117(3) of the CPC. A

155.It is important to note that s 117(3) confers upon the court a discretion to draw an adverse inference if the accused has failed to mention facts relevant to his defence in his statement. Where the court is given a discretion it must, of course, be exercised judicially having regard to all the circumstances of the case. B

156.In the present case it is important to remember that prior to the s 117(3) statement the defendant had already given an ordinary statement in which he explained how he came to be in possession of the plastic bag containing the drugs and why he had tried to dispose of it during his arrest. We are therefore not persuaded that in those circumstances it is appropriate to draw an adverse inference against the defendant. C

157.For the sake of completeness we think we should briefly deal with the prosecution submission that the defence is one of entrapment by an agent provocateur and, relying on the authority of *Public Prosecutor v Mohammad bin Usin* (Criminal Trial No 9 of 2005), this cannot constitute a substantive defence. D

158.That is clearly a misunderstanding of the defence and the term agent provocateur. An agent provocateur is someone employed to find suspected criminals or offenders by tempting them to commit an offence openly: see *Oxford Advanced Learner's Dictionary of Current English*. The defence is not that Hj Latif was an agent provocateur. The defendant is not saying he was lured or induced by Hj Latif to commit the offence. The defence is that the defendant is innocent of the charge and that he was framed by Hj Latif. E

159.Hj Latif is admittedly a man with a history of involvement in illicit drugs. We bear that in mind in assessing his credibility and the veracity of his evidence. We find him to be a credible witness and we are satisfied he told the truth when he said he went home after attending a wedding ceremony on the night of 10 December 2005, he never met the defendant and did not go to the Tumasek jetty with him that night, he was not the informer and he did not frame the defendant by leaving the drugs in his custody. F G

160.The defence, of course, does not have to prove that Hj Latif or the narcotics officers had a motive to frame him. However, the fact is that there is not a scintilla of evidence to suggest that Hj Latif or any of the narcotics officers bore a grudge against the defendant or had some motive for framing him. H

161.We accept the evidence of NO Jali that the drugs had a street value of over $100,000. The irresistible inference from such a large amount of drugs in the possession of the defendant at the jetty that night is that it must have been intended for the purpose of trafficking. I

162.Since the defendant was in possession of the black plastic bag containing the drugs the presumption arises under s 16(1) of the Misuse of Drugs Act that he had the drugs in his possession. This in turn triggers the presumption under s 16(2) that the defendant knew the nature of the drugs in his possession. Moreover, by virtue of s 15, as the defendant was in possession

of more than 20g of methylamphetamine, he is presumed to have the drug in his possession for the purpose of trafficking.

163.The onus is on the defendant to rebut the presumptions on a balance of probabilities. In our judgment the defendant has failed to rebut the presumptions.

THE GROUNDS OF APPEAL

[5] On 9 February 2009, Mr Prabhakaran filed 37 grounds of appeal. On 16 April 2009 he added two further grounds.

[6] Before us he has packaged the 37 grounds under seven headings:

Misdirections which were not open minded or fair minded and/or were based on reliance on inadmissible evidence

[7] The sweeping contention that the court was not 'open minded or fair minded' arises in large part out of the following comment by the court:

> We find that Mr Prabhakaran's suggestion that it is possible the narcotics officers had taken part in the frame up quite astonishing.

[8] This comment he suggests indicates that the court approached the evidence of the narcotics officers upon the basis that they were 'likely to be more credible and reliable that other witnesses'.

[9] He refers to *Lee Fuk Hing v HKSAR No 7 of 2004* where the jury was directed that, when dealing with allegations of violent misconduct by police officers, they should consider 'whether such acts would in fact bring not only disciplinary action against them, but they might even be prosecuted for criminal offence(s). In particular, if no dangerous drugs could be found there and then, their acts were no different from that of the robbers and would certainly bring prosecution (on themselves). When you consider the question of credibility, you can also consider this point'.

[10] Mortimer NPJ, delivering the judgment of the Court of Final Appeal dealt, as follows, with this direction:

> For over 30 years directions similar to that given by the judge have been deprecated. It is now trite law that such directions should not be given. Such comments invite the jury to approach police witnesses as likely to be more credible than other witnesses at the outset of their deliberations. Police witnesses are put

into a special category of witness further out of the jury's reach than others. Whereas juries must be invited to consider the reliability and credibility of all witnesses impartially and fairly.

[11] The first and obvious comment is that this was not a direction to a jury. Secondly the comment, related only peripherally, if at all, to credit. What the court was clearly saying was that, given that there had been no cross-examination of the officers suggesting that there had been a conspiracy by them to frame the appellant, it was astonishing that Mr Prabhakaran should conjure up such a suggestion after the completion of the defence evidence. We cannot but agree that this was an astonishing suggestion. Indeed Mr Prabhakaran himself characterised it as 'a bold submission'. There is no merit in this ground.

[12] Under this first heading it is also contended that the court allowed and placed reliance upon inadmissible evidence. The evidence of which complaint is made arises out of the information received by ANO Hairman who received information in a telephone call which led to the operation culminating in the arrest of the appellant. The prosecution repeatedly objected to Mr Prabhakaran's application's to canvass this evidence on the ground that such questions might uncover the identity of the informer. Mr Prabhakaran, however, persisted and was allowed to pursue the matter. Indeed it was the cornerstone of the defence that the call had been made by Hj Latif who was the mastermind behind a plot to frame the appellant.

[13] Indicative of Mr Prabhakaran's approach in this regard was his cross-examination of Deputy Director Othman of the Narcotics Control Bureau. The witness made no mention of this matter in either his statement or his evidence in chief. Mr Prabhakaran told the court 'I want to know what the information was. The defence is the drugs were planted on the defendant'. Objection was taken by the prosecution to the disclosure of the name of the officer who received the information and to the nature of the information on the ground that it would tend to disclose the identity of the informant. The objection was overruled and Mr Prabhakaran was allowed to elicit the information. When ANO Hairman came to give evidence Mr Prabhakaran, against further objection which was again overruled, pursued the matter eliciting the content of the information received. Mr Prabhakaran's submissions are wholly without merit. The matter was placed before the court at his insistence as an essential part of the defence. Further it may be added that there is nothing to suggest that the court placed any reliance upon that evidence rather than upon the body of admissible evidence placed before it.

Failure to prove that all the crystalline substances contain 109.27g of Methylamphetamine, a controlled drug

[14] A two pronged approach is adopted when addressing this ground. It

is submitted firstly, and most importantly, that the methodology used by Scientific Officer Ak Helmy of the Department of Scientific Services (DSS) is flawed. Secondly, it is submitted that the evidence of Ak Helmy and of Victor Keasberry who from 2002–2006 was the director of the DSS was self serving and should not be relied upon. These grounds are so interlocked that they do not call for separate consideration.

[15] The attack on the methodology places heavy reliance upon *Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1. Before turning to consider that decision, we again set out the methodology used in the present case. Three packets were seized — their respective weights were: E1(a) 47.963g, E1(b) 49.509g, E1(c) 48.810g. Presumptive tests followed by confirmatory tests (both of these are termed qualitative tests) were carried out. They were positive for Methylamphetamine. There is no issue as to these tests. Difficulties arise, however, when considering the final and, as regards the prosecution, vital quantative tests. When carrying out these tests it was the evidence of SO Ak Helmy that he individually stirred the whole contents of each of the three packets using a mortar and pestle. We deal first with difficulties which arise from the use of the word 'homogenise'. The most basic meaning of the term is simply 'mixing together' however its meaning when used in the 1987 United Nations Office of Drugs and Crime Manual ('UNODC manual') is 'mixing together by reducing to powder'. This procedure has been used in Brunei since 2006 but was not used at the time these substances were tested. The homogenisation undertaken prior to 2006 was no more than a stirring together in a mortar and pestle.

[16] For the quantative tests from each packet seven samples were taken. This was done by spreading the contents of each packet over thin aluminium foil as evenly as possible and then by dividing it as evenly as possible into seven portions. From each portion an amount was then randomly taken for analysis.

[17] The decision as to the number of samples was in accordance with a recognised scientific procedure which was to take the square root of the gross weight of the substance. The number of the samples was said to be a 'standard tabulated figure'. Except for the failure to reduce to powder form the above steps were said to be in accordance with the 1987 UNODC guidelines. Each sample was then tested using a Gas Chromatography-Mass Spectrum (GC-MS) technique. This showed the weight of narcotic within each sample (exh P16).

[18] A further test, known as the 'Outliers Test', was then called into play. This sets upper and lower limits to be used when dealing with any set of samples. Any reading outside the limits fails the test and must be excluded.

Sample No 5 from E1(a) (94.84%) and sample No 7 from E1(b) (93.44%) were in consequence removed from the calculation. When the results of the testing of the samples were applied to the whole contents the average purity was: E1(a) 73.60%, E1(b) 77.16%, E1(c) 73.29%. This resulted in a finding of an overall narcotic content of 109.27g.

[19] We must now ask whether the analysis of a mixture containing crystal methylamphetamine, which has not been reduced to powder form, was sufficiently reliable to establish beyond reasonable doubt the narcotic content of the mixture.

[20] SO Ak Helmy gave evidence that: 'Speaking from a statistical point of view taking out a number of samples from the batch in this case A, B and C can be used as a good assumption to determine the identity of the batch itself'.

[21] He agreed that each crystal had 'its own consistency, characteristic and purity'. When it was put to him that: 'There is nothing definite when it is statistics and assumption?' He replied 'True'. He would, however, not agree that the sample tested 'cannot be taken to represent the rest of the contents of that packet'.

[22] He agreed that 'the proper scientific methodology' to identify and analyse a crystalline substance would to 'firstly homogenise the whole of that suspected substance into a very fine powder'. He further agreed that 'after homogenisation the science is clearer. Before homogenisation it is relying on statistics and assumption'. He also agreed that the methodology which the DSS then used was not 'accepted and recognised internationally due to (his) failure to homogenise the substance into powder first'.

[23] Finally, he refused to agree that there was any room for doubt occasioned by the methodology which he had used

[24] In re-examination he said that he 'strongly believed' that the samples represent the whole of each packet. Of particular significance is the following passage:

> Q: It was put to you that when the crystalline substance is not homogenized into fine powder form doubt is allowed to creep in. You disagreed. Why is that?
>
> A: The reason is I do not see any difference in the result for the qualitative analysis as the sample is still the same.
>
> Q: What about quantitative analysis?

A: For quantitative analysis there might be a slight difference between a homogenized crystalline substance and homogenized into fine powder. The difference could either be showing an end result of a higher percentage purity under certain circumstances or lower percentage purity under certain circumstances.

Q: What circumstances are you talking about?

A: For fine powder form it is true it would be more homogenized and the variation of the percentage purity among the sampling done would be more precise and therefore might result in higher average percentage purity. As for the circumstances where the percentage purity could be lower it depends on how the grinding of the homogenization process took place. If the sample, the crystal substance, was allowed to evaporate from this process there would be a clear loss of methylamphetamine content. Therefore, it would lower the percentage purity.

Q: What percentage variations are you referring to?

A: The percentage variation I am referring to is the variation in the percentage purity over the number of sampling done.

Q: You have not answered my question. What is the percentage variation?

A: For example, and this is just an example, for the homogenous crystal substance, say it is around 60 to 80 percent of percentage purity of methylamphetamine. But for fine powder the variation will be smaller, say 70 to 80 percent.

Q: It was put to you there is no way there could be no doubt when the crystalline substances were still in a solid form like in this case. You said the quality of the analysis is maintained at its highest standard and you have no doubt. Can you explain what you mean?

A: This statement means I have seen it from my experience there is not much difference when we conducted the new method, that is homogenizing into fine powder, to that of the old method, as the normal trend of methylamphetamine content in Brunei is in the range of 70 to 80 percent Therefore, due to the small differences I have no doubt about the old method.

[25] We are left in doubt as to what the witness was meaning to convey by this evidence. In it, the witness certainly recognises that homogenisation into a fine powder produces a more reliable result which is, no doubt, why it is now done in Brunei.

[26] He appears to be saying that when comparing the results obtained by the method adopted in the present case and the results which are now obtained by homogenisation into a fine powder, it is found that the latter will show a variation in purity in the samples taken of no more than 10% whereas the method adopted in the present case will show a variation in purity of up to 20%.

[27] In his last answer the witness appears to find support for his conclusions in the fact that, in his experience, methylamphetamine found in Brunei normally has a variation in purity of between 70–80%. We are not satisfied that this gives support of any real weight to those conclusions. **A**

[28] It was essential in the present case to establish with clear evidence that a proper and reliable analysis had been done. The evidence was that average purities of each packet was 73.6%, 77.16% and 73.29% and that this yielded a total narcotic content of 109.27g. If the average purity had been for example, 68% it would yield a narcotic content of 99.484g. **B**

C

[29] No doubt if the method adopted by the witness had yielded a narcotic content of say, 120g a court could be satisfied beyond reasonable doubt that the amount was safely over 100g. But could a court, given the above difficulty in the evidence of SO Ak Helmy together with what we say hereafter, be satisfied beyond reasonable doubt when the analysis yields a narcotic content of only 109.27g? **D**

[30] The second scientific witness was Mr Keasberry (PW18) who when questioned about homogenisation said: **E**

> Q: That is why there is an absolute necessity to homogenize into powder form?
>
> A: You will see less variation but the average will be somewhere there.
>
> Q: Put. The average will be somewhere there is not good enough?
>
> A: I don't agree with you. If you are talking about 70% it will be somewhere there at 70%.

F

[31] Mr Keasberry also stated that the UNODC manual was 'a guideline not a bible'. **G**

[32] Finally he refused to agree with the suggestion that 'the sampling, testing and analysis was wrong and highly irregular due to non-compliance with general international standards'. **H**

[33] If homogenisation to powder form in accordance with the UNODC manual would upon analysis have produced a scientifically correct result is a result 'somewhere there' near that correct result produced by the method used in the present case sufficiently accurate to satisfy a court beyond reasonable doubt that the appellant had more than l00g of pure methylamphetamine? **I**

[34] After the prosecution had closed its case SO Ak Helmy was recalled to explain the application of the outliers test by reason of which findings not in an acceptable range are rejected when making the final calculation of narcotic content.

[35] He tendered an extract from 'Fundamentals of Analytical Chemistry' (ex 16(b)) which deals, inter alia, with 'Rejection of Outliers'. It makes the following recommendation for the treatment 'of a small set of results that contains a suspect value'.

> 3. Repeat the analysis if sufficient sample and time are available. Agreement between the newly acquired data and those of the original set that appear to be valid will lend weight to the notion that the outlying result should be rejected: Further, if retention is still indicated the questionable result will have a smaller effect on the mean of the larger set of data.

[36] This was not done in the present case nor were any questions directed to SO Ak Helmy as to why a repeat analysis had not been undertaken.

[37] It is submitted by Mr Prabhakaran that the attack on the methodology gains support from *Ang Soon Huat*'s case it being argued that that decision establishes that pulverisation into a fine powder is an absolute necessity before a proper quantative analysis can be carried out. The facts of case were however very different from those in the present case. It is true that it involved a questionable analysis of methylamphetamine however the matter turned upon the evidence of Dr Jouseland, a witness called by the defence. We have no such evidence in the present case and we reject Mr Prabhakaran's submissions in which he sought to rely upon that judgment which was grounded upon that evidence. In the present case two experts were called and both agreed that the method used had achieved a valid result.

[38] We turn finally to consider the application of the UNODC manual to the present case. This manual was propagated by the Division of Narcotic Drugs of the United Nations in 1987. It was admitted into evidence without objection and without qualification. It was therefore admissible as evidence of the facts stated and of the opinions expressed therein. Its weight in each of these respects is another matter. Its relevance is primarily with respect to the opinions it expresses.

[39] It states itself to express the conclusions of a group of 11 experts and two consultants convened by the Division of Narcotics Drugs of the United Nations and reflects their conclusions.

[40] It must be borne in mind that none of those experts has been identified nor have the qualifications of any been stated and none of their opinions have been tested by a cross-examination.

[41] It is headed 'Recommended Methods for Testing Amphetamine and Methamphetamine' and is subheaded 'Manual for use by National Narcotics Laboratories'. In its introduction it states: 'Development of internationally accepted methods of testing would contribute greatly to the achievement of these objectives, and this possibility has been under consideration for some time'. It goes on to state the 'Purpose of the Manual' as follows:

> In response to the Commission's request, a group of eleven experts and two consultants was convened in September 1986 by the Division of Narcotic Drugs in Kuala Lumpur at the invitation of the Government of Malaysia. The present manual published by the United Nations Divisions of Narcotic Drugs reflects the conclusions of the group of experts and has been designed to provide practical assistance to national authorities by describing recommended methods to be used in forensic laboratories for the identification and analysis of amphetamine and methamphetamine products. The manual may also serve as a guide to national authorities in assessing existing methods used within their own government and university laboratories
>
> This manual is the fourth in a series of similar publications dealing with the identification and analysis of various groups of drugs under international control; it was preceeded by manuals on heroin (ST/NAR/6), cocaine (ST/NAR/7) and cannabis (ST/NAR/8) analysis.
>
> These manuals suggest approaches that may help the forensic analyst to select a technique appropriate to the sample currently being examined. The analyst may then choose to follow any of the methods described in the manual, as each method can be expected to produce reliable analytical information with respect to the samples to which they are applied. Each method has been used for a number of years in reputable forensic laboratories and has been published in the scientific literature. In identifying these methods, the expert group was aware that many other useful and acceptable methods produce worthwhile analysis and information for the forensic analyst, and that a number of other acceptable options are recorded in the forensic scientific literature.
>
> *Use of the manual*
>
> Few methods are perfect, least of all in forensic drug analysis where the materials under examination are very likely to show significant variation both in their physical form and chemical composition. The choice of methodology and approach to analysis remains within the control of the analyst working within his or her own country. The analyst alone has seen the suspect material and can best judge the correct approach to the problem at hand. Furthermore the choice of methods may necessarily depend on the availability of reference materials and of instrumentation.

A Not all the methods listed need to be applied to all samples suspected to contain amphetamine or methamphetamine. Requirements may vary, for example, as a result of local trends in samples encountered, facilities available, and the standard of proof acceptable in the prosecution system within which the analyst works. The more complex methods are needed only for certain forensic requirements, such as comparison of samples or for source determination.

B

[42] We note that under both of the above headings the manual is expressed in advisory rather than mandatory terms. That is understandable; it could hardly impose its methods on sovereign nations. We would expect C that it would be careful to avoid this.

[43] On the other hand, in the body of the document, the discussion of specific methods of analysis is expressed in mandatory terms, especially as to minimum requirements which are set out below.

D

[44] Mr Prabhakaran placed particular reliance on 'Part IV The analysis of materials containing amphetamine/methamphetamine'. Sub-part 1 of Part IV deals with 'Powders'. Item (c) of sub-part 1 'Sampling of materials containing E gummy or large aggregates' states 'If the particles can be easily reduced to powder, then this approach should be used and sampling procedure followed as outlined previously. Powdering may be achieved by mortar and pestle, commercial food-processor/mixer, or industrial grinder. If the material cannot be easily broken down, then random sized particles should be drawn F from at least three different parts of the item. A minimum of 1g should be collected, weighed accurately and subjected to assay'.

[45] It is contended that, in the present case, this would require that the seized substance be powdered. The particles with which we are concerned G could have been 'easily reduced to powder' and that this was not done. Item (c) goes on to indicate that a satisfactory analysis can be done by drawing 'random seized particles from at least three different parts of the item'. However the final significant stipulation is that 'a minimum of 1g should be collected, weighed accurately and subjected to assay'. This also was not done H in the present case as the amount collected for assay from each bag was considerably less than 1g — each was less than a 1/2 of a gramme. This was never raised in the court below whether the analysis must be considered unsatisfactory on this ground is, we are satisfied, nonetheless, a matter which now falls for our consideration.

I

[46] This stipulation regarding the minimum is plainly in mandatory terms. It leaves no room for doubt that, in the opinion of the authors of the document, to obtain an accurate analysis the amount analysed should not be less than 1g.

[47] When coming to our conclusion on the submission of a failure to prove the narcotic content, we bear in mind: A

(a) The words in the 'Purpose of the manual' which state 'many other useful and acceptable methods produce worthwhile analysis and information for the forensic analyst ...'. B

(b) The words in the 'Use of the manual' which state 'the choice of methodology and approach to analysis remains within the control of the analyst working within his or her own country. The analyst alone has seen the suspect material and can best judge the approach to the problem at hand'. C

(c) The evidence of Mr Keasberry that 'the manual is a guideline not a bible'.

(d) The expert evidence of both Mr Keasberry and SO Ak Helmy that the method used produced a scientifically acceptable and reliable result. D

[48] We are nonetheless gravely concerned by the following matters:

(a) The unsatisfactory nature of the evidence of SO Ak Helmy and Mr Keasberry as to the reliability of the old test when considered alongside the test now applied; E

(b) The failure to follow the textbook approach when applying the outliers test; and

(c) The failure to use the mandatory quantity stipulated in the UNODC manual in the analytic tests. F

[49] Having considered the foregoing we find ourselves left in doubt as to reliability of the expert evidence. The appeal must be upheld on this ground. G

Whether PW14 is an expert

[50] The third heading challenging the expertise of SO Ak Helmy was not pursued. H

Findings of fact that were wrong and/or against the weight of evidence

[51] Under the fourth heading, Mr Prabhakaran argued that there were finding of fact which were wrong or against the weight of evidence. Those which have arguable merit are dealt with below. I

[52] It was submitted that two police witnesses ANO Zulmadji and NO Kamran had lied when they said that they did not know Hj Latif the alleged

A informant who, it was said, entrapped the appellant. Mr Prabhakaran contended that the evidence established that he had been known to them and that the court misdirected itself when it held that they were witnesses of truth.

B

[53] He contended further that the court failed to give proper weight to what the court itself had found to be a 'lackadaisical attitude' to the keeping of the exhibit handover book.

C **[54]** We find no weight in those submissions.

[55] Much was made by Mr Prabhakaran of discrepancies between the written statements of three of the arresting narcotics officers and their evidence as to what had occurred immediately prior to the arrest. It is to be noted, however, that only the last of the three witnesses was challenged in this regard. The court was aware of these discrepancies, considered them and, was satisfied that they did not affect the credibility of the officers.

D

E **[56]** We turn to the complaint that the court rejected the defence evidence without giving it fair and impartial consideration. This contention, as regards the evidence of the appellant himself, is without merit. The court in paras 140–148 of its judgment gave full consideration to the appellant's evidence. The prosecution case which was that the appellant and the three witnesses he called had agreed among themselves to a fabricated story which exonerated the appellant, was clearly put to the appellant in cross-examination as follows:

F

Q: Put: The evidence you have given in court about Murni and Hj Mansor being at the jetty is a fabrication?

G

A: I am very sad upon hearing the things said by the Prosecutor. I disagree.

Q: In fact both Murni and Hj Mansor have a close relationship with you?

A: Yes among family and being neighbours it is not denied we are close.

H

Q: Put: Because of your close relationship they are willing to agree with your story about being at the jetty.

A: I disagree. They are willing to be my witnesses because they want to tell what happened. They have their stories to tell. It is not fabrication. I disagree.

I

[57] Argument can, however, be mounted against the way in which the court dealt with the evidence of the defence witnesses. The court said:

In our opinion the three witnesses who gave evidence on behalf of the defendant were also not credible witnesses. They can hardly be said to be disinterested witnesses, Murni being the defendant's brother-in-law and Hj Mansor and Nooraisah, the defendant's next door neighbours, and all of whom according to the defendant enjoyed a 'close relationship' with him. We disbelieve their evidence that they were at the jetty that night. We think they tailored their evidence to buttress the defence of a frame up.

[58] It is submitted that the above fails to detail any proper grounds for rejecting their evidence upon the basis that 'they tailored their evidence to buttress the defence ...'. If their evidence was on its face credible and unshaken, there is merit in this submission. It is submitted, however, by Mr Prabhakaran that their evidence 'was never inconsistent'. This is not, however, fully justified by an examination of the evidence. There were three matters which might be described as discrepancies between the evidence of these witnesses:

(a) Hjh Noraini (DW2) who gave evidence that she was at the jetty at the time of the appellant's arrest says that she was escorted by two friends the ten paces from the car in which she arrived to the boat of her father Hj Mansor (DW3). She was quite definite in this evidence. On the other hand her father was sure that when she came out of the car she was alone.

(b) Hj Mansor said that when he got to the jetty, he saw two men fishing with a ball of string and that they did not have fishing rods. Hj Murni (DW4) who gave evidence that Hj Mansor was at the jetty also gave evidence that two men were fishing but said that he saw one fishing rod and one ball of string. He said that one of them was setting up a fishing rod.

(c) We are also reminded by DPP Jasmine that PW2 and her father DW3 gave differing version as regards the parking place of the car in which she came to the scene.

[59] The above are, however, in our view, matters which are equally consistent with differing recollections of honest witnesses doing their best to recall a set of circumstances which occurred rapidly and in short sequence.

[60] The only reason given by the court for rejecting the evidence of the three defence witnesses and being satisfied that they had tailored their evidence was that they were 'the defendant's next door neighbours' who 'enjoyed a close relationships with him'. Would those facts, standing alone, as they did, justify the rejection of their evidence?

[61] That the court had nothing more to rely upon arose out of the fact that, inexplicably in our view, none of the three witnesses was cross-examined upon the basis that they had put their heads together to fabricate an exculpatory story. It was simply put to them that they were not telling the truth.

[62] DPP Jasmine submits that the court was entitled summarily to reject the evidence without reasons and has referred us to a number of authorities. In our view they gave no support to her argument. We refer to only three of them — one from Malaysia, one from Hong Kong and one from Canada.

[63] In *Balasingham v Public Prosecutor* [1959] MLJ 193, Ismail Khan J dealt with the prosecution of a public servant for accepting an advantage in which the trial judge accepted the evidence of the principal prosecution witness without giving any reasons. He simply said 'I accepted Wong Yong's version and rejected that of the defendant'. Ismail Khan J considered this to be 'a most unsatisfactory and cavalier way of dealing with highly controversial facts'.

[64] In *HKSAR v Tang Siu Chuen Criminal Appeal No 67 of 2007* the Court of Appeal did hold that there was no merit in the complaint of failure give reasons for disbelieving a defence witness. However, the witness had given evidence on 'a relatively minor issue' which the court was satisfied 'did not as a matter of necessity requires specific reasons being given as to the judge's rejection of him as a credible witness'.

[65] The same cannot be said of the three witnesses in the present case. They were vital to the defence. If their evidence was believed or if it was sufficiently credible to raise a reasonable doubt then the appellant was entitled to be acquitted.

[66] We refer finally to the Canadian case of *R v REM* [2008] SCC 51 which affirmed the test laid down in *R v Sheppard* [2002] 1 SCR 869 and *R v Braick* [2002] 1 SCR 903 which is that the appellant must show a deficiency in the reasons whereby they fail adequately to 'perform the function for which they are required namely to allow the appeal court to review the correctness of the trial decision'.

[67] In the case before us we are satisfied that the reasons for rejecting the evidence of the defence witnesses upon the basis that they had tailored their evidence were inadequate and that inadequacy does prevent this court from reviewing the correctness of the trial decision. It is of no moment that the inadequacy was occasioned by the failure of the prosecution to pursue the matter in cross-examination.

[68] For this reason also the appeal must succeed.

Break on the chain of evidence

[69] We turn next to the fifth heading in which it is submitted that there was a break in the chain of evidence relating to the seized suspected narcotics and that there was a failure properly to secure them. It is true that the exhibit registry book is defective but there was oral evidence to establish that the exhibit was securely handled. It is true that the suspected narcotics were kept in a ziplock bag which could easily have been opened but there is nothing to suggest that it was in any way tampered with.

Poor and unfair investigation

[70] The sixth heading involves a submission that the police investigation was unfair because of the disappearance of a mobile phone seized from the appellant which might have been used to prove that Hj Latif had telephoned him to trick him into going to the scene of arrest. The suggestion that the narcotics officers had knowingly failed to utilise the information on the phone as to calls made on it fell away when, after considerable time had been spent on the matter, it was conceded that the suggested use of the phone had only come to light during the cross-examination of Hj Latif by which time, the phone seems to have been return with the appellant's personal effects to his family. We are satisfied that there is no merit in this heading.

Whether information should be reduced to writing

[71] The seventh heading which dealt with the failure to reduce to writing the information in the telephone from the informant was abandoned.

[72] For the reasons set out above, we are satisfied that the appeal must be allowed.

[73] This trial occupied just under 30 days. It was however spread over ten months. It is most undesirable that any trial, let alone a trial for a capital offence, should be fragmented in this way. It places an unacceptable burden on the court and on counsel. Adjournments in the course of any trial are to be avoided except for the most cogent reasons.

Appeal allowed.

Reported by Andrew Christopher Simon